

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
October 25, 2006 Session

**STATE OF TENNESSEE v. KENNETH W. SNELL**

**Direct Appeal from the Circuit Court for Rutherford County  
No. F-57740 Donald P. Harris, Judge**

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**No. M2006-01088-CCA-R3-CD - Filed December 19, 2006**

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A Rutherford County Circuit Court jury convicted the appellant of reckless aggravated assault and domestic assault, and the trial court sentenced him as a Range I, standard offender to two years for the reckless aggravated assault conviction and to six months for the domestic assault conviction. The trial court ordered that the sentences run concurrently and that the appellant serve the sentences as three years on probation. On appeal, the appellant argues that the trial court abused its discretion by denying his request for judicial diversion. Upon review of the record and the parties' briefs, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Reversed and  
Case Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. McLIN, JJ., joined.

John G. Mitchell, Jr., and Darwin C. Colston, Murfreesboro, Tennessee, for the appellant, Kenneth W. Snell.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Thomas S. Santel, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

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The facts in this case are scarce because the appellant failed to include the trial transcript in the appellate record.<sup>1</sup> However, according to the appellant's presentence report, on December 13, 2003, the appellant was waiting on his ex-girlfriend, Susan Lester, to return to her home. When she arrived, she went into her kitchen and told the appellant to leave. He refused, and they got into an argument. The appellant punched Lester on her left jaw, knocking her down and causing her to hit her head on the refrigerator. Two men, who had arrived home with Lester, went to help her and tried to get the appellant to leave. The appellant got into a physical altercation with the men and then went outside and got a gun out of his pickup truck's glove box. He fired two rounds at close range, striking one of the men, Michael Shane Ross, in the upper left chest. The appellant fled the scene but was later arrested. According to the appellant's statement in the presentence report, Ross and the second man chased him, and the appellant fell. The two men hit and kicked him, but the appellant was able to break away and run to his truck. The men chased the appellant to the driver's side door, and the appellant jumped into the truck, grabbed his gun, and fired two shots.

The appellant was charged with attempted first degree murder, aggravated assault, reckless endangerment, possession of a weapon during the commission of an offense, and domestic assault. At trial, the appellant claimed that he shot Ross in self-defense, but the jury convicted him of the lesser included offense of reckless aggravated assault, a Class D felony, and domestic assault, a Class A misdemeanor.

At the appellant's sentencing hearing, Ross testified that as a result of the shooting, he had to quit his job at Bridgestone because he could not lift heavy treads into a machine that makes tires. He stated that pieces of the bullet were still in his body and that his left shoulder hurt when he performed physical labor. At the time of the sentencing hearing, Ross was self-employed as a flooring installer and could not work in a factory because he needed to take breaks when he had pain in his shoulder. He stated that he lost his health insurance when he quit working for Bridgestone, that he needed surgery to repair nerve damage in his arm, that he could not afford to go to a doctor, and that he had spent about five hundred dollars in out-of-pocket medical expenses. He said he did not have to give up any hobbies as a result of the shooting and could still play with his children. However, the shooting had affected his sons, and Ross was afraid to be in crowds. He stated that he wanted justice to be done and that having to see the appellant "get away with this" was "just not right." On cross-examination, Ross acknowledged that despite being nervous in crowds, he still went to bars. He also acknowledged that he was charged with domestic assault in August 2005 but said the charge was dismissed. At the time of the hearing, Ross had a civil suit pending against the appellant.

The appellant testified that other than a traffic offense, he had no other prior convictions. He stated that Ross and the other man kicked him in the head and that he did not understand why they

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<sup>1</sup>We note that the burden is upon the appellant to ensure that the record before this court conveys a fair, accurate, and complete account of what transpired in the court below with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b); *see also State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993). Although the State noted in its brief that the trial transcript was not in the appellate record, the appellant inexplicably failed to supplement the record with the transcript. *See* Tenn. R. App. P. 24(e), (g).

were not charged with attempted murder. The appellant believed he shot Ross in self-defense and was charged with a crime he did not commit. The appellant said he had always been employed, had never been in trouble before, and would never be in trouble again. On cross-examination, he acknowledged that he and Susan Lester had an eighteen-month-old son, who was conceived while the appellant was on bond for these offenses. He also acknowledged that as a condition of his bond, he was ordered to stay away from Lester's home or "any other location [she] is likely to be." Despite this order, Lester stayed with the appellant at his home and became pregnant. However, another judge ruled that Lester, not the appellant, violated the order.

Linda Dumat testified that she was retired but used to work as a psychiatric nurse at a veteran's hospital in Murfreesboro and met the appellant in 1991 while he was working at a car dealership. Dumat was a customer at the dealership, and the appellant always treated her honestly and fairly. She stated that despite the appellant's convictions, she believed he was a nonviolent person.

Jimmy Earle testified that he was a former head basketball coach and athletic director for Middle Tennessee State University (MTSU) and coached the appellant's father in college. He stated that he had known the appellant for more than twenty years and thought so much of the Snell family and the appellant that he had wanted to testify at the appellant's sentencing hearing. He described the appellant as "one of the finest young men I've ever been around" and said the shooting was out of character for the appellant.

The State introduced the appellant's presentence report into evidence. According to the report, the then thirty-eight-year-old appellant was divorced, lived with his girlfriend and young son, and graduated from MTSU in 1994. In the report, the appellant described his health as good and said he was not taking any prescription medications. He said he began drinking alcohol when he was in high school and drank socially until he committed the offenses in this case. Since his arrest, the appellant had stopped using alcohol. He also stated that he used marijuana sometimes while he was in college but that his use of the drug never became a habit. The report shows the appellant worked as a psychological assistant at Peninsula Hospital in Maryville, Tennessee from 1994 to 1996 and has been the general manager at Stones River Motors since 1996.

In sentencing the appellant, the trial court stated that it had considered the presentence report, letters the appellant's friends and family wrote on his behalf, the testimony of the witnesses, and enhancement and mitigating factors. The trial court also noted that the jury disbelieved the appellant's claim of self-defense, finding that he recklessly fired his weapon. After sentencing the appellant to two years for reckless aggravated assault and six months for domestic assault, the trial court stated the following regarding judicial diversion:

I'd say first that I don't find that diversion is appropriate in this case because of the nature of this offense. I think when someone shoots another individual, the nature of the offense prohibits him from being granted diversion. I also like the result, truthfully, that a felony

conviction will prevent Mr. Snell from ever carrying a firearm again. And I think his judgment was poor enough in this case that that's a good result and should be part of this case.

I don't find that Mr. Snell is likely to ever commit another crime.

Although the trial court denied the appellant's request for judicial diversion, it granted his request for full probation and ordered that he serve his sentences as three years on probation. The trial court also assessed a five-thousand-dollar fine for the felony conviction and a twenty-five-hundred-dollar fine for the misdemeanor conviction and ordered that the appellant pay fourteen thousand five hundred dollars into a trust for Ross's future medical expenses, pending the outcome of Ross' civil suit.

## **II. Analysis**

The appellant argues that the trial court abused its discretion by denying judicial diversion because it did not consider all of the required factors, such as his amenability to correction, lack of a prior criminal record, positive social history, and the deterrence value to himself and others. He contends that almost all of the factors support diversion. In addition, he contends that the trial court failed to articulate clearly why the nature of the offenses and the need to prevent him from carrying a firearm in the future outweighs the favorable factors. The State claims that the trial court properly denied the appellant's request for judicial diversion. We agree with the appellant's argument that the trial court failed to explain adequately why it denied the appellant's request for judicial diversion.

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. See Tenn. Code Ann. § 40-35-313(a)(1)(B). It is within the trial court's discretion to grant or deny judicial diversion. See State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). As such, the trial court's decision will be overturned only if the court abused its discretion. Id. In other words, we will not interfere with the denial of judicial diversion if the record contains any substantial evidence to support the trial court's refusal to grant diversion. Id. Moreover, we observe that "judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion [under Tennessee Code Annotated section] 40-15-105." State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In determining whether to grant a defendant judicial diversion, the trial court must consider all of the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the status of the defendant's physical and mental health, and (6) the deterrence value to the defendant and others. State v. Lewis, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). "The trial court should also consider whether judicial diversion will serve the ends of justice--the interests of the public as well as the accused." Id. The record must reflect that the trial court has taken all of the factors into

consideration. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). As a consequence, “we may not revisit the issue if the record contains any substantial evidence supporting the trial court’s decision.” Id. Furthermore, “[t]he court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others.” Electroplating, Inc., 990 S.W.2d at 229.

The trial court’s comments demonstrate that it denied the appellant’s request for diversion primarily because of the nature of the offenses. We note that the nature and circumstances of an offense alone may support a denial of judicial diversion. State v. Kyte, 874 S.W.2d 631, 634 (Tenn. Crim. App. 1993). However, although this case involved the shooting of a victim, the appellant was convicted of a Class D felony and a misdemeanor, and the statutory provisions of judicial diversion provide that he is eligible for diversion. Therefore, the trial court was required to consider all of the factors. Given that the trial court failed to address many of the factors it was required to consider, such as the appellant’s personal characteristics, and failed to explain why the factors supporting the denial of diversion outweighed the factors supporting diversion, we are compelled to reverse the judgment of the trial court and remand the case in order for the trial court to explain adequately on the record why the appellant was denied judicial diversion and why the factors relied on outweigh the others.

### **III. Conclusion**

Based upon the record and the parties’ briefs, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

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NORMA McGEE OGLE, JUDGE